No. 9467

In the United States Circuit Court of Appeals

Ninth Circuit

W. W. PERCIVAL, Guardian of the Persons and Estates of John Percival Luce and Dorothy Hume Luce, Minors,
Appellant,

vs.

HAROLD LUCE,
Appellee.

Appellant's Brief

Upon Appeal from the District Court of the United States for the District of Nevada

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STATEMENT OF THE CASE

This is an action on a written agreement made by Harold Luce, Appellee, and Dorothy Luce Lehman, formerly Dorothy Luce, by the terms of which the defendant agreed to pay to Dorothy Luce, his former wife, the sum of $25.00 per month for the support and maintenance of each of his two children, John Percival Luce and Dorothy Hume Luce. This action is brought by the general guardian of the two children. It is alleged in the complaint that the defendant has failed and re-

fused to pay to the plaintiff, or to any other person, for the use and benefit of the said minor children, all or any part of the monthly payments which have accrued since November 1, 1926 and that the sum of $7600.00 together with interest is now due and owing. The agreement is attached to and made a part of the complaint.

The defendant has, in his answer, admitted that he is the natural father of the minor children, has admitted the execution and delivery of the agreement described in the complaint, and has admitted that no payments have been made on the contract since November 1, 1926. It is alleged in the answer that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph one of the complaint. The defendant also denies that "there is now due and owing under the terms of said agreement or any other obligation the sum of $7600.00 or any part thereof."

In addition to the foregoing several defenses are urged by the defendant:

1. The complaint fails to state a claim against the defendant upon which relief can be granted. (R-7.)

2. The second defense consists of the admissions and denials hereinabove mentioned. (R-7.)

3. The agreement upon which the plaintiff's complaint is based was rescinded by the parties. (R-8.)

4. That the plaintiff is in the same position as Dorothy Lehman, formerly Dorothy Luce, and the said

Dorothy Lehman and also the plaintiff have been guilty of laches. (R-8.)

5. That on October 14, 1926, the District Court of Weber County, State of Utah, made and entered a decree of adoption of the minor children by Irving Lehman and his wife, Dorothy Lehman, formerly Dorothy Luce, and that since October 14, 1926, the minor children have been regarded as their lawful children. (R-9.)

Both the plaintiff and defendant filed motions for judgment on the pleadings. (R-11, 12.) The trial court denied the plaintiff's motion and granted the defendant's motion, and judgment was entered accordingly. (R-12, 13.)

STATEMENT OF POINT UPON WHICH APPELLANT INTENDS TO RELY

The appellant contends:

1.

That the court erred in granting the defendant's motion for judgment on the pleadings, and

2.

The court erred in denying the plaintiff's motion for judgment on the pleadings. (R-16.)

These points will be discussed in order.

ARGUMENT

Before proceeding with the argument as to the legal sufficiency of the complaint and answer in this case, a

few well-settled rules with respect to the nature and effect of a motion for judgment on the pleadings will be briefly discussed. It has been said that a motion for judgment on the pleadings is in the nature of a general demurrer. The following general statement of the law appears in Corpus Juris:

> "Like a demurrer the motion admits the truth of all well pleaded facts in the pleadings of the opposing party together with all fair inferences to be drawn therefrom. The party moving for judgment on the pleadings also admits the untruth of his own allegations in so far as they have been controverted." (49 C. J. 668, 669.)
>
> Leack v. Kentucky Block Co., 256 F. 686;
>
> United States v. Rubin, 233 F. 125;
>
> Osbourne v. Abels, (Cal. A.), 87 P. (2d) 404;
>
> United Mercury Mines v. Pfost, (Idaho) 65 P. (2d) 152.

See also David v. Robert Dollar Company (C.C.A. 9) 2 F. (2d) 803 in which it is said:

> "It is said that a motion for judgment on the pleadings is not favored by the courts, and this is true, if the motion is permitted to cut off the right to amend, thus preventing a hearing on the merits. But if the motion for judgment is treated as a demurrer to the defective pleading with leave to amend in a proper case, as was done here, the practice is sanctioned by usage and free from objection."

Where a material issue of fact is tendered, judgment on the pleadings is improper.

49 C. J. 670;

Barnes v. Southern Pac. Co. (C.C.A. 9) 300 F. 481; Commercial Credit Co. v. Semon, 33 F. (2d) 356;

United States v. One Quart of Whiskey, 29 F. (2d) 929;

State v. Skaget River Co. (Wash.) 45 P. (2d) 27.

A motion for a judgment on the pleadings does not admit conclusions of the pleader.

49 C. J. 678;

Daniels v. Daniels, 3 Cal. A. 294, 85 P. 134;

State v. Wurdeman, 311 Mo. 64, 277 S. W. 571.

Matters not well pleaded need not be denied and are not confessed by a motion for judgment on the pleadings.

49 C. J. 699;

State v. Guinotte (Mo. A) 282 S. W. 68.

The courts have repeatedly held that the granting of a motion for judgment on the pleadings is not regarded with favor and that the pleadings should be liberally construed to further justice.

Boland v. Boland, (Okl.) 43 P. (2d) 79.

This rule is well stated in the case of Betsch v. Umphrey (C.C.A. 9) 252 F. 573, 164 C.C.A. 489 as follows:

> "The granting of a judgment upon the pleadings on motion is not regarded with favor by the courts. The pleadings must be clearly bad, in order to justify a judgment in favor of the other party; and if there is any reasonable doubt as to its sufficiency, judgment on the pleadings will not be rendered. So the defect must be substantial and not merely formal or technical."

Under the well settled rules mentioned above the defendant cannot succeed upon a motion for judgment on the pleadings unless the complaint construed in the light most favorable to the plaintiff fails to state a claim upon which relief can be granted. Since, for the purpose of the motion, the defendant admits the untruth of the allegations in his answer, we may, for the purpose of determining whether the trial court erred in granting the defendant's motion, confine our argument in this connection to the complaint.

1.

This suit is instituted upon the theory that the minor children, are third party beneficiaries of a contract between the defendant Harold Luce and Dorothy Luce, providing for their support and maintenance. It is well settled that a third party has a direct cause of action upon a contract made for his benefit and may sue in his own name or in the case of minors in the name of a general guardian.

Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855;

American, etc., Assurance Company v. Helvering, 68 F. (2d) 46;

Garratt v. Baker, 56 P. (2d) 255; 13 C. J. 705; and cases cited in note 4;

Page on the Law of Contracts, volume 4, Section 2387, page 4207.

This rule has been applied in cases in which the third party to be benefited by the agreement is a near relative of the promises.

> "The doctrine that a third person may maintain an action on a contract made for his benefit has been applied . . . to a promise on a sufficient consideration to pay money or furnish support to the wife, child or other near relative of the promissee." 13 C. J. 707, 709.

The following cases support this proposition:

Dailey v. Minnick, 117 Iowa 563, 91 N. W. 913, 60 L.R.A. 840;

Benge v. Hiatt, 82 Ky. 666, 56 Am. R. 912;

Clarke v. McFarland, 5 Dana 45;

Van Dyne v. Vreeland, 11 N. J. Eq. 370;

Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 70 Am. S. R. 454, 44 L.R.A. 170;

Babcock v. Chase, 92 Hun. 264, 36 N.Y.S. 879;

Knowles v. Erwin, 43 Hun. 150;

Preston v. Preston 172, N. W. 371;

Clark v. Clark, 164 Minn. 201, 204 N. W. 936;

Mowry v. Thompson, 250 N. W. 52;

Climan v. Lepley, 256 N. W. 739.

In the case of Maxwell v. Boyd, 100 S. W. 540, 123 Mo. App. 334, it is held that a provision in a separation agreement for the support of a minor child is enforcible by the trustee of such minor children. In Gould v. Gunn, 161 Iowa 155, 140 N. W. 380, it was held that such a separation agreement may be enforced by the children.

There is no difference insofar as the legal rights of the parties are concerned between the contract sued upon and a contract between strangers for the benefit of a third party named in the agreement and to whom the promissee and the promisor owe an obligation. The defendant was obligated as a natural father to support his children at the time the agreement sued upon was made and the agreement merely served to definitely state the amounts to be paid by the defendant to the children for their support.

The case of Marks v. Wooster, 199 S. W. 446 (Mo. App.) is directly in point. In that case as in this, there was a contract made in contemplation of the divorce which provided for payments and maintenance of a child. The mother later remarried and then brought action on the contract to recover delinquent installments. In affirming the judgment of the trial court, the appellate court said:

> "In the case before us the contract sued upon so far as it provides for the performance of the aforesaid duty by defendant does no more than require him to do that which it was his legal and

> moral duty to do, viz., to support his child. The instrument which in the view just expressed is supported by ample consideration served to fix the amount which defendant was compelled to contribute to the boy's support and education while he remained in the plaintiff's custody and was supported and educated by her in accordance with the agreement."

It has been held that separation agreements providing for the support and maintenance of a wife and child are not contrary to public policy. 19 C. J. 340, Sec. 787, Diettrich v. Haberman, 124 Or. 508, 264 P. 845.

Upon an examination of the complaint in this case, it will be found that after alleging the legal capacity of the plaintiff to sue and the jurisdictional facts, it is alleged that the defendant is the father of the minor children, John Percival Luce and Dorothy Hume Luce, and that the defendant and the mother of the children entered into an agreement providing for their support and maintenance and the agreement is attached, marked Exhibit "A" and made a part of the complaint. Under rule 10(c) of the Rules of Civil Procedure, this written instrument shall be considered a part of the complaint for all purposes. It is alleged in paragraph three of the complaint that the defendant has, although often requested, failed and refused to pay to the plaintiff or to any other person for the use and benefit of the minor children, all or any part of the monthly pay-

ments which fell due under the terms of the agreement since on or about the 1st day of November, 1926, and that there is now due and owing under the agreement the sum of $7600.00 together with interest. It will be noticed upon examination of the agreement that it was executed in contemplation of divorce. The party of the first part is Harold Luce, the defendant in this case. The agreement provides:

> "That the party of the second part may be awarded the custody of the aforesaid children with the right and privilege in the party of the first part to visit with said children at any and all reasonable time, after reasonable notice to the party of the second part;
>
> For the support and maintenance of the aforesaid children the party of the first part shall pay to the party of the second part the sum of $25.00 per month for each of said children, the payment of said sum of $25.00 per month to discontinue as each child attains the age of majority.
>
> There are now living as the issue of said marriage, two children, to-wit: John Percival Luce, now of the age of about three, and Dorothy Hume Luce, now of the age of about one and one-half years."

It will be noted that at the time of the execution of the agreement John P. Luce, one of the minors was three years of age and Dorothy Hume Luce, the other, was one and one-half years of age. It should also be noted that in consideration of the payments specified,

the wife, Dorothy Luce relinquished all right, claim or demand that she might have in or to the property of the party of the first part and released him from all obligation in the premises, except as expressly set out in the agreement:

> " . . . provided, however, that in the event the court, upon proper application being made therefor, should at any time in the future decide that the said $25.00 per month for the support of each of said children, is insufficient, then the said party of the first part agrees to increase that amount as ordered by the court."

There is no clause in the agreement which would effect the termination thereof insofar as the obligation to support the children is concerned and under the circumstances and for the purpose of this argument the contract is shown on the face of the complaint to be in existence and in full force and effect. As pointed out above an agreement of the character of Exhibit "A" providing for the support and maintenance of a wife and children is not contrary to public policy and it is not illegal. The complaint shows on its face that the obligation is a continuing obligation and that the defendant's liability accrues from month to month during the minority of the two children. The agreement shows that the children were three years of age and one and one-half years of age in 1925 and it is therefore apparent that they are still minors.

Under Rule 17(c) of the Rules of Civil Procedure an infant may sue or be sued in the United States Dis-

trict Court by a general guardian as was done in this case. In view of the foregoing, the trial court clearly erred in granting the defendant's motion for judgment on the pleadings because the complaint states a claim upon which relief can be granted.

2.

The court erred in denying plaintiff's motion for judgment on the pleadings. On the plaintiff's motion for judgment on the pleadings where his complaint has been answered, the court must assume the truth of all material allegations in both pleadings. 49 C. J. 669. As observed above, legal conclusions stated in the answer or facts not well pleaded must be ignored. This rule is of importance in this case for the reason that it will be noted that every defense urged in the answer is based upon a legal conclusion of the pleadings. The defenses will be discussed in order:

First Defense

This is in the nature of a general demurrer and the sufficiency of the complaint has been fully discussed above.

Second Defense

The defendant denies that the name of the minor children is Luce. This is immaterial.

Defendant alleges that he was without knowledge or information sufficient to form a belief as to the truth concerning the allegations as to the legal capacity of the plaintiff and as to the jurisdictional facts. It will be noted that Rule 9(a) of the Rules of Civil Procedure

provides that when a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued he shall do so by specific negative averment which shall include such supporting particulars as are within the pleader's knowledge. There is no specific denial of the plaintiff's legal capacity to sue.

The defendant admits the execution and delivery of the contract and admits that he has paid nothing for the support of the children since November 1, 1926. This would leave an amount in excess of the jurisdictional amount still due and owing from the defendant to the plaintiff. Under the second defense, it is also admitted that the defendant is the father of the minor children on whose behalf this suit is brought. He denies that he was requested to make payments. This allegation is immaterial because no request is necessary to fix his obligation under the contract. It is also denied that the defendant is obligated in the sum of $7600.00 or in any other sum, but it will be noted that in the fourth defense the defendant admits that he has made no payments since November 1, 1926. No material issue of fact is raised by the second defense.

Third Defense

After admitting the execution and delivery of the contract upon which this suit is brought, the defendant in the third defense alleges a legal conclusion to the effect that the agreement does not exist. It is further alleged by way of legal conclusion that the agreement

merged into and became a part of a certain specified judgment. The allegation respecting the judgment contains no statement as to whether a judgment was entered requiring the payment of the various sums for the support of the children, and no attempt is made to allege what the judgment provided. The allegation stating, the entry of a judgment as it does, without any allegation of ultimate fact, is entirely ineffectual. Even though we assume for the purpose of argument that the defendant has alleged facts sufficient to show that the separation agreement was incorporated into and became a part of the decree, still there would not be such merger as to destroy the cause of action of minor children on the contract. The minor children were not parties to the divorce proceeding and their rights were not represented by a guardian or other legal representatives. The rights of the children, as against the defendant, were definitely stated in the agreement, and once such rights vest they cannot be destroyed by a so-called merger. The contract insofar as the children are concerned still exists, although at the same time, the plaintiff in the divorce proceeding might have a right against the defendant on the judgment.

In the case of Stone v. Bailey (Wash.) 134 P. 820, 48 L.R.A. (N. S.) 429, a separation agreement was incorporated into a decree of divorce and yet the court throughout the opinion referred to the rights of the children under the contract, and finally held that the

children had a vested right which survived the death of the father.

It is not contended that the judgment has been paid and on the contrary it is alleged that no payment has been made since November 1, 1926.

The doctrine of merger cannot be used to accomplish unjust results. The rule is well stated as follows in Corpus Juris:

> "The limitation of doctrine. The doctrine of merger will not, however, be carried any further than the ends of justice require; the judgment does not annihilate the debt or destroy its character as evidence, nor does it deprive the creditor of his right to resort to a fund held by a trustee, or to avail himself of a lien or security held for the debt; and when the essential rights of the parties are influenced by the original contract, the court will look behind the judgment for the purpose of ascertaining what the original contract was." 34 C. J. 754.

In the case of Rossiter v. Merriman, 104 P. 858, 80 Kan. 739; 24 L.R.A. (N. S.) 1095, an action was brought by the plaintiff upon a promissory note secured by a mortgage in a jurisdiction other than that in which the land was located, and thereafter an action was commenced to foreclose the mortgage. It was contended by the defendant that the note had become merged in the personal judgment and extinguished and could not thereafter be the subject of a suit; the court held:

"However, the merger and extinguishment of the note did not discharge the debt nor extinguish the mortgage. The form of the debt was changed but the debt itself for which the mortgage was secured remained in full force. The debt secured by the mortgage is the primary obligation between the parties and the note is no more than the primary evidence of that debt."

See also:

Murphy v. Manning, 134 Mass. 488;

Gould v. Svendsgaard, 141 Minn. 437; 170 N. W. 595.

In 34 Corpus Juris 756, the rule is stated thus:

"To make a former judgment a bar to the maintenance of a present suit, it must have been rendered in an action between the same parties or between those in privity with them and there must be identity of the quality in the persons in or for whom the claim is made, or in other words, identity of the parties in the character in which they are litigants."

34 C. J. 756 and numerous cases cited.

The minor children were not parties to the divorce action and their rights under the contract are therefore not merged in the judgment.

As stated in the plaintiff's brief, the minor children were third party beneficiaries under the contract and as such they had a cause of action against the defendant who is the obligor. If the defendant's theory were sound, upon the entry of decree of divorce, all rights of

children under a contract would be extinguished. Suppose, for the purpose of argument, that instead of agreeing to pay the children money, the father had agreed to convey certain land to the children. Could counsel properly argue that upon the entry of the divorce decree between the husband and wife, the children's cause of action for specific performance of an agreement to convey land had been extinguished? We think not. Courts have always protected property rights of minor children and it is elementary that such rights cannot be conveyed by the children without guardianship proceedings and a proper court order. As stated in Corpus Juris:

> "The doctrine of merger will not, however, be carried any further than the ends of justice require." (34 C. J. 754.)

If the defendant's contention is sound, the doctrine of merger, would be relied upon to deprive minor children of a cause of action, which of course is contrary to all principals of justice.

Fourth Defense

It is next contended that the agreement was rescinded by the parties in November, 1926. This bare statement is, of course, a legal conclusion. It is followed by an allegation that the defendant made payments to his former wife for the use and benefit of minors to and including November 1, 1926, but that on November 13, 1926, the defendant's former wife returned a certified check for $50.00 and advised the de-

fendant that the children had been adopted, and that no further payments for the support of the children would be accepted by her or by anyone else on behalf of the children. Here, we have a contention that a child's natural and contract right against a father for support and maintenance may be cut off, dissipated or lost by the words and acts of the child's mother. The law is to the contrary. In the case of Fernandez v. Aburra, 103, P. 366, 42 Cal. A. 131, it was held that a minor child's right to support by its father may not be contracted away by either parent.

In the case of in re Stowell, 159 N.Y.S. 84, 172 App. Div. 684, it was held that the right of an infant child to support from his father survives not only an agreement by his mother assuming to act as his trustee, but any settlement of that agreement by her.

In Southern California Edison Company v. Industrial Accident Commission of California, 92 Cal. App. 355, 268 P. 415, it was held that a minor child has an absolute right to support by parents, who cannot shift their responsibility by any act, conduct, contract or alteration of the domestic status. Other cases holding that a child's right to support cannot be defeated by agreements between their parents are:

McCarter v. McCarter, 10 Ga. App. 754, 74 S. E. 308;

Harper v. Tipple, 21 Ariz. 41, 184 P. 1005.

There is no allegation in the answer that any person with authority to act for the child has, by court or-

der, or otherwise entered into an agreement to rescind the agreement sued upon herein and it is elementary that a child's right cannot be frittered away at the whim of its mother, as it is alleged was done in this case.

See also:

Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A.L.R. 689;

Michaels v. Flach, 197 App. Div. 478, 189 N.Y.S. 908;

Von Roeder v. Miller, 117 Misc. 106, 190 N.Y.S. 787.

Fifth Defense

The next defense that the plaintiff cannot recover because he and the child's mother have been guilty of laches is too frivolous to warrant serious discussion. It certainly is not the law that a father may evade his obligation to support his children simply because no demand for support has been made over a number of years for the reason that someone else chose to support them. As recited in the agreement, John Percival was about three years of age and Dorothy Hume Luce about one and one-half years of age at the time of its execution. It would be surprising indeed if the rights of children of that tender age could be lost because of neglect or bad judgment on the part of their mother.

Sixth Defense

The sixth defense is that, subsequent to the execution of the agreement sued upon and to the entry of the

decree of divorce, the minor children were adopted by Irving Lehman, the second husband of Dorothy Luce and herself. At the time of the adoption proceedings, John P. Luce was approximately four years old and his sister two and one-half years old. They had, of course, no choice in the matter and it is our position that minor children cannot be deprived of natural rights and contract rights for support by a contract of adoption any more effectually than they can be deprived of their rights by other agreements made by their mother. It has been repeatedly held under adoption statutes, similar to those in force in Utah and also in Nevada, that adoption does not deprive a child of a similar right, that of inheritance from its natural parents. In the case of Sorenson v. Churchill, 51 S. D. 113, 212 N. W. 488, the court said:

> "Under the law of adoption, the natural parent and the adopting parent each must consent to the new relationship before the child can be legally adopted. By consent each is bound. The adopted child, the person principally affected by the transaction, has no choice and gives no consent. His natural parent, by his consent to his adoption, loses his right to inherit from his natural son. But no one consents for the innocent and helpless subject of the transfer that he shall lose the right to inherit from his natural parent. . . ."

The same reasoning is applicable to the right of support.

See also:

Re Roderick, deceased, 158 Wash. 377, 291 P. 325;

An extensive note, 80 A.L.R. 1403.

In the case of In re Sears Estate, 169 Atl. 776, 313 Pa. 415, a suit was brought against a father for support of minor children and the father made the same defense as here, that his former wife had remarried and that her second husband had undertaken to support and care for the children. The court said:

> "As to the contention that the consideration failed because of the second marriage of the child's mother and the fact that her second husband had assumed the status of a supporting father towards this child, we agree with Judge Gest of the court below that this did not have the slightest effect upon the father's formal obligation."

It is alleged under the sixth defense that the adoption proceedings were instituted in Utah in 1926. The adoption statute in Utah in effect at that time provided in part:

> "Consent of child's parents necessary, when. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, cruelty or desertion, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty,

neglect or desertion: provided, that it shall be sufficient to give the court jurisdiction to order the adoption of any child, without notice to the parent or parents thereof, whenever it shall appear that the parent or parents whose consent is required, as herein provided, have theretofore, in writing, acknowledged before any officer authorized to take such acknowledgment, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 59 of the Laws of Utah, 1923, and such agency consents in writing to such adoption." (Laws of Utah, 1925. C. 91, P. 198.)

It will be noted that the consent of the parents is necessary to give the court jurisdiction, except in cases where a parent has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion. The separation agreement, Exhibit "A," provides that the mother shall have custody of the child and if we assume for the purpose of this argument that this particular provision was made a part of the decree (although it is not shown definitely by the pleading) still the defendant in this case was not judicially deprived of custody within the meaning of the Utah Statute. Although no cases in Utah have been found which relate to this specific problem there is a recent case construing the Nevada Statute which is substantially the same as the Utah Statute. In the case of In re Jackson, 55 Nev. 174; 28 P. (2d) 125, the court held that Section 9478, Nevada Compiled Laws, should be

strictly construed and that the consent of a natural father is always necessary unless he has been deprived of *all rights* of custody by a court decree in a divorce or other proceeding. There, a father was divorced on grounds of cruelty, but he was given certain rights to visit the children (as the defendant here was given by the agreement), and the court held that under the circumstances the father had not been deprived of all his paternal rights; that his consent to adoption was necessary, and that the order of adoption made without his consent *"was void."* The Nevada Supreme Court, in arriving at this conclusion followed the cases:

Re Cozza, 163 Cal. 514, 126 P. 161;
Re Lease 99 Wash. 413, 169 P. 816.

It appears on the face of the answer that the adoption decree was entered on October 14, 1926, and that the defendant did not know of the adoption until November 13, 1926. (See Fourth Defense (R-8.)) It is therefore apparent that he did not consent to the entry of the order of adoption and therefor under the ruling of the Nevada Supreme Court the decree was void. Although such an argument might have little weight if made by the mother of the child because of the principle of estoppel, estoppel would have no significance in this case because the minor children both under four years of age would not be precluded from asserting a claim under the contract because of the conduct of the parents. As observed by the Supreme Court of South

Dakota in the case of Sorenson v. Churchill, supra, involving adoption,

> ". . . but no one consents for the innocent and helpless subject of the transfer, that he shall lose the right to inherit from his natural parent."

CONCLUSION

1. The complaint stated a cause of action and therefore the defendant's motion for judgment on the pleadings should have been denied.

2. It is apparent that the answer raises no material issue of fact. On the motion for judgment on the pleadings, the many legal conclusions stated in the answer have no legal significance. This being an action upon a contract, there is no question of damages involved which would require the taking of proof and the plaintiff is entitled to judgment on the pleadings.

If the court should conclude that there is a material issue of fact raised by the answer any such allegations are deemed denied by the plaintiff. It will be noted that under rule 7(a) of the Rules of Civil Procedure there shall be a complaint and an answer and a reply need not be filed, except in cases in which the answer contains a counterclaim denominated as such. Rule 8 (d) provides:

> "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Where the pleadings raise material issues of fact, a motion for judgment on the pleadings filed by either plaintiff or defendant should be denied.

The judgment of the trial court granting the court's motion for judgment on the pleadings and denying the plaintiff's motion must be reversed.

Respectfully submitted,

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